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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE ADMINISTRATIVE LAW COURT

H.W. Funderburk, Jr., Administrative Law Judge

Opinion No. Op. 5972 (S.C. Ct. App. filed March 1, 2023)

McEntire Produce, Inc. Petitioner,
v.
South Carolina Department of Revenue Respondent.

**PETITIONER'S REPLY TO RESPONDENT'S RETURN
TO PETITION FOR WRIT OF CERTIORARI**

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Pursuant to Rule 242 of the South Carolina Appellate Court Rules (“SCACR”), Petitioner McEntire Produce, Inc. (“Petitioner” or “McEntire”) files this reply to the Department of Revenue’s Return to Petitioner’s Writ for Certiorari to review the decision of the Court of Appeals styled *McEntire Produce, Inc. v. South Carolina Department of Revenue*, Op. No. 5972 (S.C. Ct. App. March 1, 2023) (Howard Adv. Sh. No. 8 at p. 23) (“Court of Appeals’ Opinion”), which reversed the holding of the Administrative Law Court (“ALC”) and found in favor of the South Carolina Department of Revenue (“Department”). Appendix (“App.”) pp. 1-43 (“ALC Order”).

ARGUMENTS

I. PETITIONER HAS ESTABLISHED A BASIS FOR GRANTING ITS PETITION FOR CERTIORARI UNDER RULE 242(B), SCACR.

In its Return, the Department appears to have conflated the unique nature of Petitioner’s business with the number of taxpayers impacted (See p. 7, FN 5: “If the nuances of McEntire’s business are so unique, query whether this case presents a ‘special and important’ reason worthy of the Court’s discretionary review. The application of a statute to a narrow and limited segment of the manufacturing industry may not rise to the level of important public interest that generally supports granting a writ of certiorari” (citations omitted)). In other words, certiorari should not be granted because Petitioner is one of the few, if only, taxpayers impacted. To the contrary, Petitioner has based its Petition on the application of the Machine Exemption to not just McEntire, but rather to a “fresh food *processor* like McEntire.” (Petition at 5 (emphasis in original)).

This distinction is important because it reflects the far-reaching impact of the Court of Appeals’ Opinion. How big is the food processing and food manufacturing industry in South Carolina? As of January 2021, the South Carolina Department of Agriculture identified *twelve* separate and distinct regional alliances within South Carolina alone, composed of *94 companies*. SC Department of Agriculture, Regional Alliances, available at <https://scagribusiness.com/wp->

content/uploads/2021/09/SC-Alliance-Food-Manufacturing-Map-2021.pdf (last visited July 31, 2023) (also produced as Exhibit A for the convenience of the Court). According to the Bureau of Labor Statistics, the food processing industry as of May 2022 supported close to 10,000 full-time jobs in South Carolina, which is more than four in every 1,000 jobs in South Carolina. U.S. Bureau of Labor Statistics, May 2022 State Occupational Employment and Wage Estimates, South Carolina, *available at* https://www.bls.gov/oes/current/oes_sc.htm#35-0000 (last visited July 31, 2023).

Because by definition all food manufacturers have a processing area dedicated to the production of food in their facility, the Court of Appeals' Opinion will impact each of them. In sum, while the manufacturing and processing facility requirements of a fresh food processor like McEntire certainly are *unique* given the highly specialized and regulated industry in which it operates, the Court of Appeals' Opinion will have substantial and far-reaching impacts on a significant industry that is vital to South Carolina.

II. THE RULE OF STRICT CONSTRUCTION SHOULD NOT BE APPLIED TO A SALES TAX EXEMPTION STATUTE DESIGNED TO PROMOTE ECONOMIC DEVELOPMENT.

The Department addresses the general rule of strict construction courts apply to tax exemption statutes generally in South Carolina. However, this rule of strict construction against the taxpayer is not always applied as narrowly when the interpretation of economic tax incentive statutes is involved. Such statutes should not be so strictly construed against the taxpayer as to defeat or destroy the legislative intent and should further, not frustrate, the policy of rewarding investment and spurring economic development.

Courts often have concluded that the general rules that tax exemptions be strictly construed against the taxpayer and doubt resolved in favor of taxability must yield to the intent of the legislature. *See Arizona v. Capitol Castings, Inc.*, 88 P.3d 159, 160 (Ariz. 2004) (concluding

machinery exempt from tax by emphasizing the purpose of the tax exemptions was to “stimulate business investment in Arizona in order to improve the state’s economy and increase revenue from other taxes” and that the exemptions “should further, not frustrate, the policy of encouraging investment and spurring economic development”). *See also Sharp v. Tyler Pipe Indus., Inc.*, 919 S.W.2d 157, 161 (Ct. App. Tex. 1996) (terms “liberal” and “strict” as applied to statutory construction can be misleading where other principles are at work; construing tax exemption statutes too narrowly could defeat legislative purpose of economic development); *Idaho State Tax Comm’n v. Haener Bros.*, 828 P.2d 304, 307 (Idaho 1992); and *Amoena Corp. v. Strickland*, 283 S.E.2d 894, 897 (Ga. 1981) (construing the Georgia sales tax exemption for machinery and equipment in which the Georgia Supreme Court stated that “it is true that tax exemptions are to be strictly construed against the taxpayer and doubts resolved in favor of taxability. However, this should not impinge on the other rule that a statute is to be construed in accordance with its real intent and meaning and not so strictly as to defeat the legislative purpose.” 283 S.E.2d at 897.)

Indeed, in its Technical Advice Memorandum (TAM) 89-14, the South Carolina Department of Revenue stated this rule of statutory construction with regard to the Infrastructure Tax Credit:

It is ambiguous whether the language “any one infrastructure project” means that only one project § qualify for the credit per year or whether the credit is merely limited to 50% or \$10,000 of expenses paid. Many South Carolina cases have held that tax statutes are not to be extended beyond the clear import of their language, *and any substantial doubt as to its meaning is to be resolved in favor of the taxpayer.* (*Southeastern Fire Ins. Co. v. South Carolina Tax Commission*, 253 S.C. 407, 171 S.E.2d 355 (1969); *Deering Milliken, Inc. v. South Carolina Tax Commission*, 257 S.C. 185, 184 S.E.2d 711 (1971)).

It therefore appears that the appropriate interpretation of this statute should be the one most favorable to the taxpayer. Section 12-7-1250(A) should thus be construed to mean that a taxpayer is

not limited to the number of projects which will qualify for the credit.

S.C. TAM 89-14 (emphasis added).

The South Carolina Supreme Court has previously recognized the importance of economic development incentives in a number of sales tax exemption cases. In one case dealing with a sales tax exemption, the Court noted that the purpose of exempting the purchase of machinery is “to promote new industry within the State and encourage expansion of present industry.” *Southeastern-Kusan, Inc. v. S.C. Tax Comm’n*, 276 S.C. 487, 490, 280 S.E.2d 57, 59 (1981); see also *Hercules Contractors & Engineers v. S.C. Tax Comm’n*, 280 S.C. 426, 435, 313 S.E.2d 300, 306 (Ct. App. 1984); and *Anon. Corp. v. S.C. Dep’t of Rev.*, 99 ALJ-17-0153 (1999) (noting that “[c]ourts of other jurisdictions have recognized that construing tax exemption statutes too narrowly could defeat the legislative purpose of such statutes”).

The Department of Revenue took a similar position in S.C. Private Letter Ruling (PLR) 95-3 regarding a similar Title 25 economic development incentive, the Job Tax Credit Act. At that time, as noted in the PLR, the Job Tax Credit was limited to a “[c]orporation” [which] means a business entity which is **subject to** South Carolina taxes as contained in Section 12-7-230 and Chapter 7, Title 38. (Emphasis in original.)”

As an S corporation, the taxpayer “paid no corporate level taxes.” *Id.* The PLR nevertheless held the taxpayer was entitled to the credit, stating:

In reviewing Code Section 12-7-1220 in its entirety, the legislature intended the job tax credit to be available as an economic incentive to encourage businesses subject to corporate level taxes to expand work forces in South Carolina. Although it is rare that S corporations are subject to corporate level taxes and it is rare that S corporations convert to C corporations, S corporations may earn and carryover a job tax credit.

Id.

The clear objective of the Machine Exemption is to encourage and reward investment in South Carolina for manufacturers. Thus, the Machine Exemption should be construed in a way that furthers its objectives, rewards Petitioner for making investments in this State, and continues to encourage investments in the State.

III. THE COURT OF APPEALS HAS CREATED A NEW, UNSUPPORTED “AS NEEDED” REQUIREMENT FOR THE MACHINE EXEMPTION.

The Department contends the Court of Appeals “did not create a new standard or a seasonal exception.” (Return at 19). However, based on a plain reading of its Order, there can be no other conclusion. In applying the Machine Exemption to Petitioner’s purchases of maintenance tools, the Court of Appeals plainly rejected the substantial testimony of Petitioner and the ALC’s own findings, in concluding the Machine Exemption did not apply because “[t]he evidence demonstrates McEntire uses its maintenance tools on an ‘as needed’ basis.” (Court of Appeals Order at 12).

To demonstrate how this is a new standard or requirement, we must look to the ALC’s characterization of the use of those maintenance tools. The ALC’s Order states:

[Petitioner] uses maintenance tools to maintain, repair, install, and uninstall equipment. In the cold, damp environment of the facility, machinery wears out so quickly that *[Petitioner] has thirty (30) fulltime employees working continuously to repair and maintain equipment.*

R. p. 13 (emphasis added). The ALC Order also states:

[Petitioner] employs thirty (30) fulltime employees who only work to maintain, repair, install, and uninstall equipment within the facility. Because the processing of fresh produce is regulated by climate control and other environmental controls, the cold and damp conditions inside of the plant cause machinery to constantly require maintenance and repairs. Thus, general *Maintenance Tools that are used to maintain, repair, install, and uninstall exempt machines inside of the plant are used on an ongoing, continuous basis* and therefore fall within the Machine Exemption.

R. p. 23 (emphasis added). The ALC thus found Petitioner had 30 full time employees and that those employees work “continuously” to maintain Petitioner’s machines.

The Court of Appeals then rejected the ALC’s factual findings that 30 full time employees were working on a continuous basis on general maintenance and found:

SCDOR argues the general maintenance tools used to maintain, repair, install, and uninstall equipment are not used on an ongoing and continuous basis and, thus, do not qualify for the machine exemption. Regulation 117-302.5(B)(1)(b) provides a machine is integral and necessary to the manufacturing process *if it is “used on an ongoing and continuous basis during the manufacturing process.”* The evidence demonstrates McEntire uses its maintenance tools on an “as needed” basis. Thus, they are not tax exempt.

Court of Appeals Order at p. 12 (emphasis added).

The Court held that maintenance tools were used on a “as needed” basis and thus were not used on an ongoing and continuous basis. By contrast, the ALC Order explicitly found as a matter of fact such tools were used “on an ongoing, continuous basis.” Read literally, the Court of Appeals’ Opinion render virtually all machinery and equipment subject to sales taxes for the simple reason that every machine and equipment is used on an “as needed” basis.

In the same vein, the Court of Appeals extended this newly-constructed “as needed” standard to manufacturers operating on a seasonal basis. As a fresh food processor, Petitioner by definition it works on a seasonable basis, although crops are processed on a yearly basis from California and Mexico. There are a number of fresh food processors in South Carolina, and they are vital to South Carolina’s agricultural economy. In addition to selling salads and produce to grocery stores, they sell fresh food to multiple restaurants for inclusion in their dishes. The Court of Appeals’ Opinion holds that equipment used on a seasonal basis is not exempt.

The ALC found that for Petitioner,

as a manufacturer of seasonal agriculture, the **Generator Rental**

(20) during certain seasons to facilitate the manufacture of tomatoes is sufficient to constitute an ongoing and continuous basis so as to qualify for the exemption. In fact, it is the rental of the generators only on an as-needed, seasonal basis that makes their use ongoing and continuous. Otherwise, owning them and letting them sit dormant during the off-season would, under the logic provided by the Department, also disqualify them from the exemption. The seasonal use of equipment to manufacture a variable crop should be considered ongoing and continuous and, as such, the generator rental is integral and necessary to the tomato manufacturing process and falls within the Machine Exemption.

R. p. 24. By contrast, the Court of Appeals Order (pp. 12-13) found:

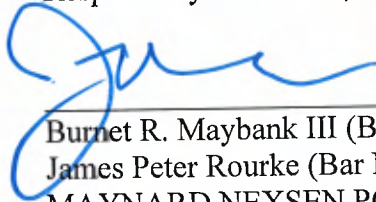
Finally, SCDOR also argues the generator rentals are not used on an ongoing and continuous basis and, thus, do not qualify for the exemption. McEntire asserted the generators are used to speed up the ripening process and change the colors of the tomatoes and they are not used year-round because some crops do not need ripening. Because they are not used on an ongoing and continuous basis, they are not tax exempt. See Regulation 117-302.5(B)(1)(b) (providing a machine is integral and necessary to the manufacturing process if it is “used on an ongoing and continuous basis during the manufacturing process”).

Read literally, the Court of Appeals’ Opinion renders virtually every machine used by agricultural processors subject to sales taxes, as they are all used on a seasonal basis. Many, if not virtually all, agricultural industries work on a seasonal basis, not just fresh food processors. Therefore, the potential impact of this new standard on an entire industry of South Carolina certainly rises to the level of “exceptional circumstances” for which a writ of certiorari may be granted. *Lafitte v. Bridgestone Corp.*, 381 S.C. 460, 471, 674 S.E.2d 154, 160 (2009) (citing *In re Breast Implant Product Liability Litigation*, 331 S.C. 540, 503 S.E.2d 445 (1988)).

CONCLUSION

For the above-stated reasons, McEntire respectfully requests that this Court issue a writ of certiorari to review the Court of Appeals' Opinion in this matter.

Respectfully Submitted,



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July 31, 2023
Columbia, South Carolina

Attorneys for Petitioner
McEntire Produce, Inc.

EXHIBIT A

SC DEPARTMENT OF AGRICULTURE PUBLICATION

SOUTH CAROLINA REGIONAL ALLIANCES

Charlotte Douglas International Airport, NC

Norfolk, VA
282 mi

LEGEND

- Fall Line
- Interstate
- CSX Rail Line
- NS Rail Line
- Short Rail Line
- County Name
- Interstate Number
- Point of Interest

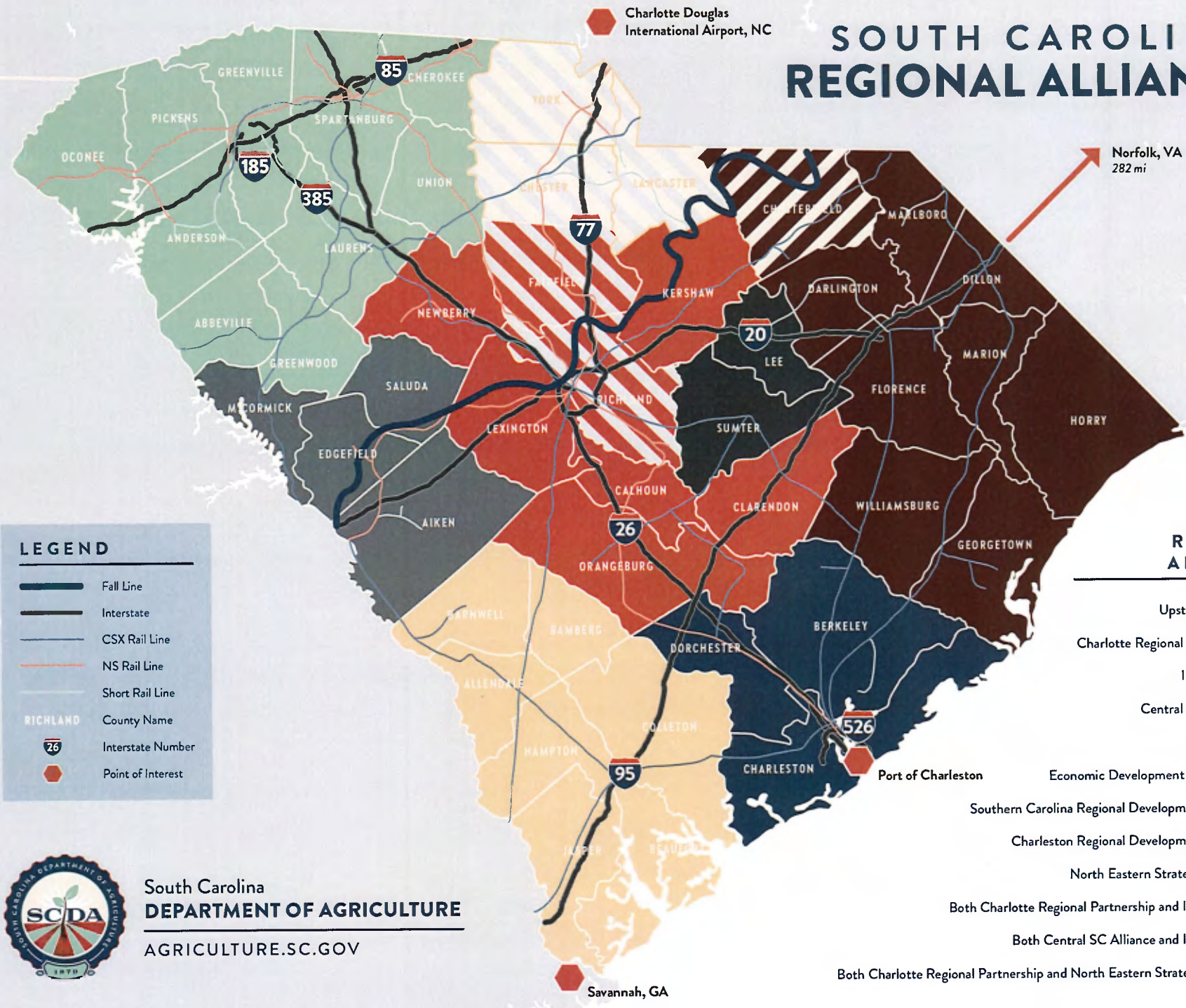
REGIONAL ALLIANCES

- Upstate Alliance
- Charlotte Regional Partnership
- I-77 Alliance
- Central SC Alliance
- The LINK
- Economic Development Partnership
- Southern Carolina Regional Development Alliance
- Charleston Regional Development Alliance
- North Eastern Strategic Alliance
- Both Charlotte Regional Partnership and I-77 Alliance
- Both Central SC Alliance and I-77 Alliance
- Both Charlotte Regional Partnership and North Eastern Strategic Alliance



South Carolina
DEPARTMENT OF AGRICULTURE
AGRICULTURE.SC.GOV

Savannah, GA



UPSTATE ALLIANCE

FOOD MANUFACTURING COMPANIES

ANDERSON

- Duke Foods

FOUNTAIN INN

- Setterstix Corporation

GAFFNEY

- Americold Logistics
- Brown Packing
- Nestle

GREENVILLE

- Americold Logistics
- Evans General Contractors
- Francis Produce
- House of Raeford

GREENWOOD

- Carolina Pride

LAURENS

- Country Fresh
- TrueCore
- Walmart Distribution

MAULDIN

- BI-LO Distribution NKA Food Lion
- CF Sauer

PIEDMONT

- Americold Logistics

SPARTANBURG

- Keurig Dr. Pepper
- Spartanburg Meats



I-77 ALLIANCE

FOOD MANUFACTURING COMPANIES

KERSHAW

- ADM

LANCASTER

- McClancy Ingredients

RICHBURG

- Haddon House Food Products/UFI Food Distribution



LEGEND

- Fall Line
- Interstate
- CSX Rail Line
- NS Rail Line
- Short Rail Line
- Columbia** City Name
- City Marker
- Interstate Number

CENTRAL SC ALLIANCE

FOOD MANUFACTURING COMPANIES

BETHUNE

- Cal Maine

CASSATT

- Prestage Farms

COLUMBIA

- Adluh
- Americold Logistics
- Anson Mills
- Columbia Meats
- Mark Anthony Brewing, Inc.
- Mars Pet Care
- McEntire
- Treehouse Foods
- Tyson

ELLOREE

- Food Lion

GASTON

- Diamond
- Linage
- Southeast Frozen Foods

LEXINGTON

- Dominos
- Golden State Foods
- Cargill
- Sysco
- Senn Brothers
- US Foods
- Vertical Roots

NEWBERRY

- Heinz
- Pioneer Brands

ORANGEBURG

- Bimbo Bakeries
- Cactus Feeders
- Pure Blue Fish

PONTIAC

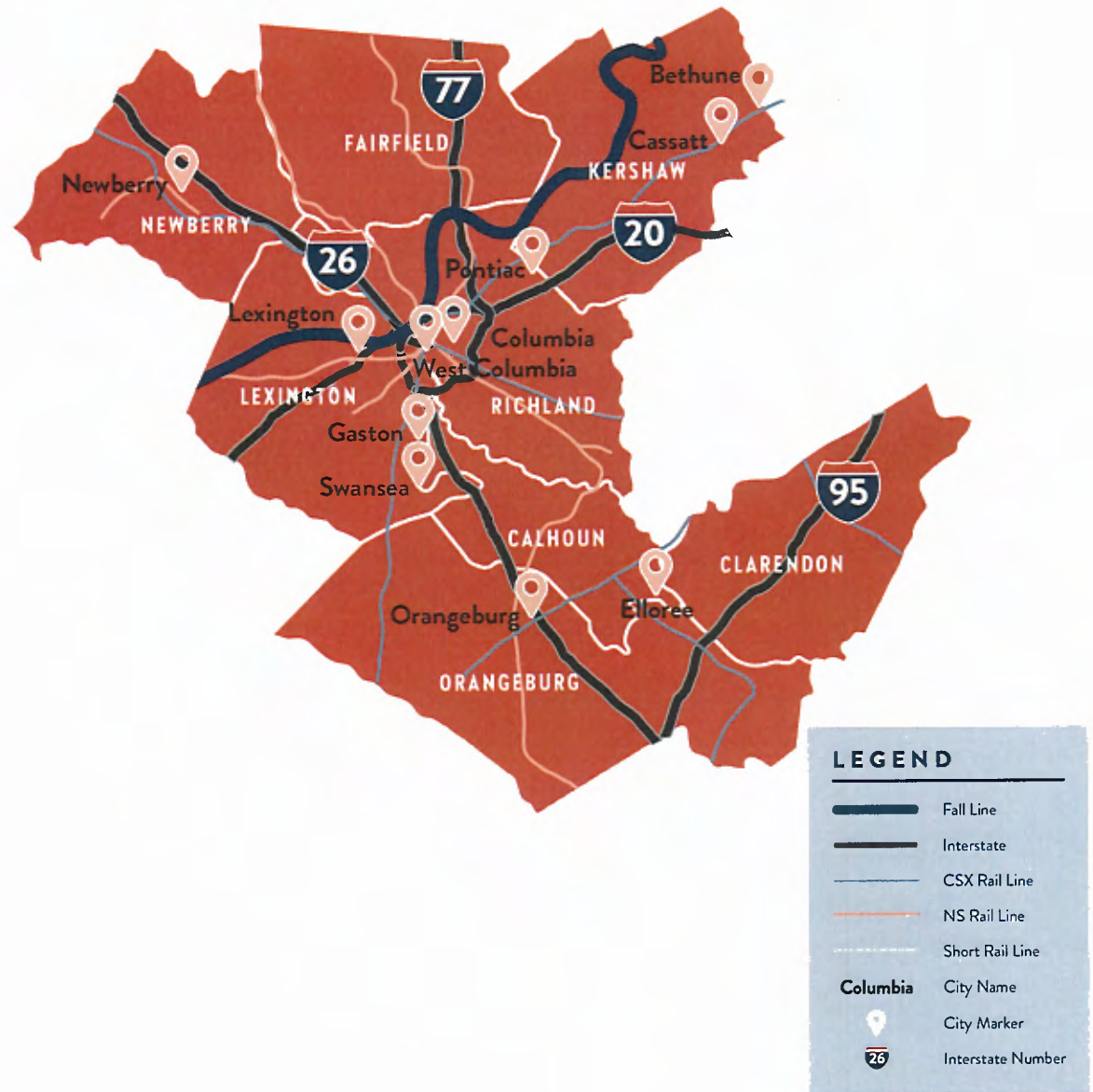
- Pontiac Foods

SWANSEA

- Devro
- Starbucks

WEST COLUMBIA

- Frito Lay
- House of Raeford



THE LINK








FOOD MANUFACTURING COMPANIES

SUMTER

- Americold Logistics
- Harvin Choice Meats
- Palmetto Pigeon
- Pilgrims



LEGEND

	Fall Line
	Interstate
	CSX Rail Line
	NS Rail Line
	Short Rail Line
Columbia	City Name
	City Marker
	Interstate Number

ECONOMIC DEVELOPMENT PARTNERSHIP

FOOD MANUFACTURING COMPANIES

AIKEN

- Walther Farms

BATESBURG-LEESVILLE

- Amick Farms
- SC Pet Food Solutions

MONETTA

- Titan Farms

SALUDA

- Jamaican Chicken
- Palmetto Gourmet Foods

WARD

- Valley Proteins



LEGEND

	Fall Line
	Interstate
	CSX Rail Line
	NS Rail Line
	Short Rail Line
Columbia	City Name
	City Marker
	Interstate Number

SOUTHERN CAROLINA REGIONAL DEVELOPMENT ALLIANCE

FOOD MANUFACTURING COMPANIES

EARLY BRANCH

- CWF GEM, LLC
- LiDestri Food and Drink
- Yield Gem

HARDEVILLE

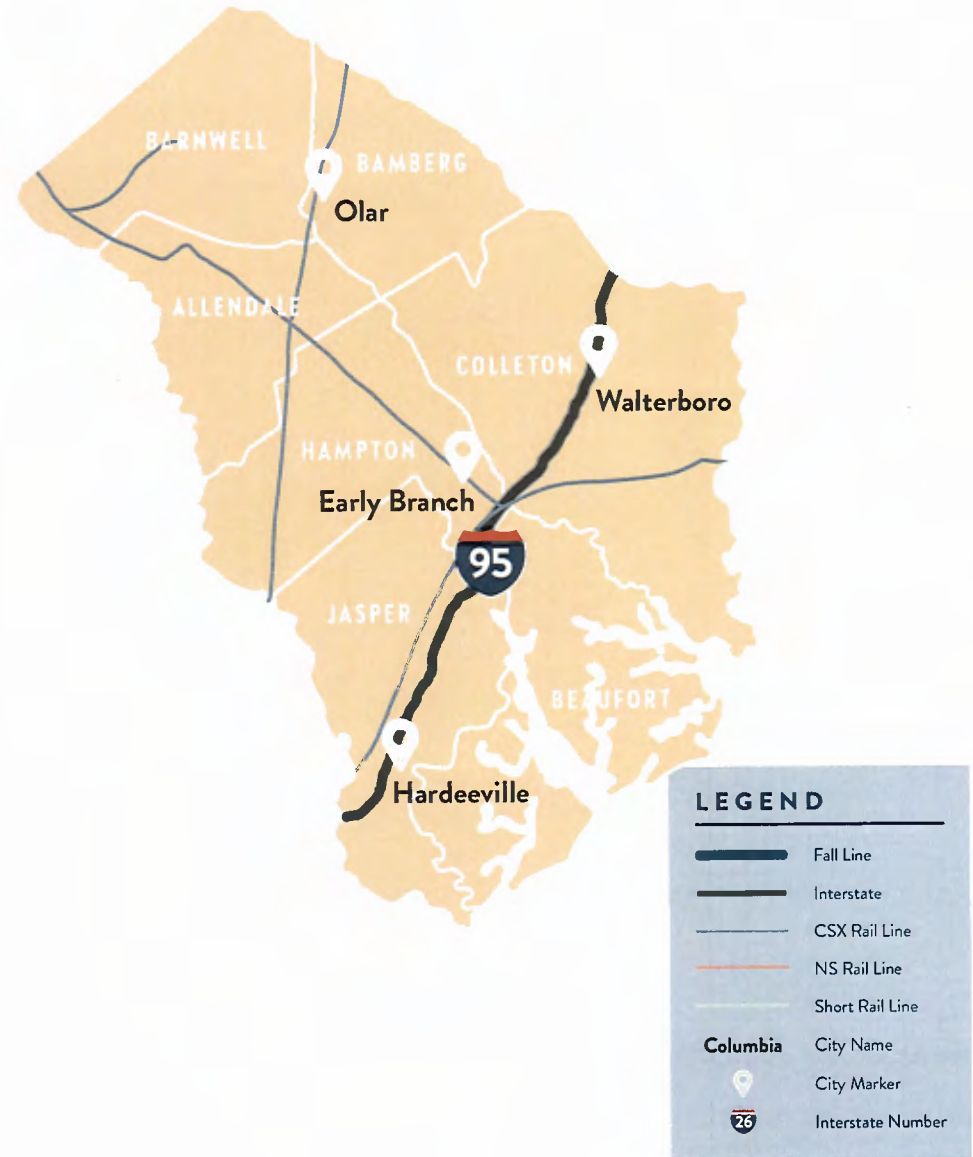
- Beverly Foods

OLAR

- Innovative Poultry

WALTERBORO

- Crescent Dairies



CHARLESTON REGIONAL DEVELOPMENT ALLIANCE

FOOD MANUFACTURING COMPANIES

CHARLESTON

- High Wire Distillery
- Ingredion
- Limehouse Produce
- Lineage Logistics Services, LLC
- Lowcountry Kettle
- NOCS/Emergent

NORTH CHARLESTON

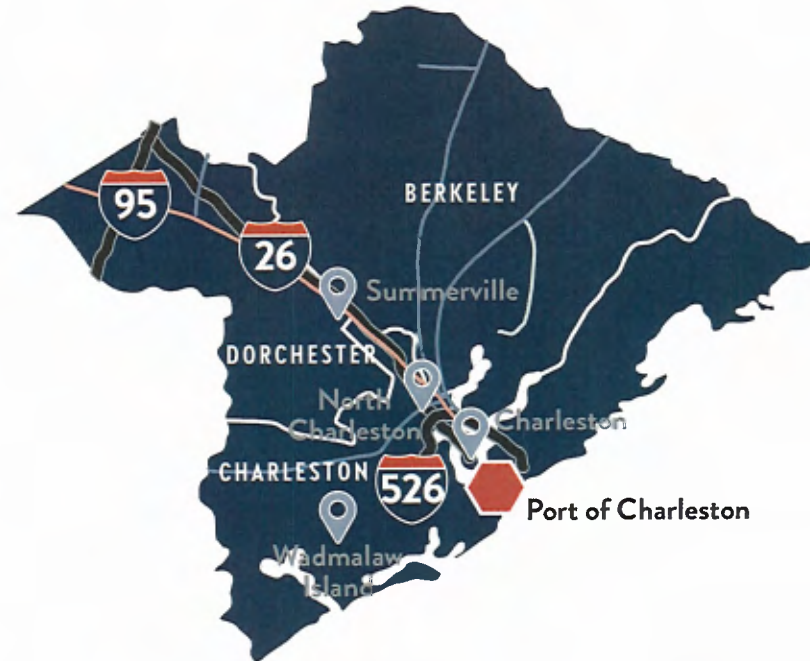
- Quality Foods

SUMMERVILLE

- ARGO Merchants

WADMALAW ISLAND

- Charleston Tea Plantation



LEGEND

	Fall Line
	Interstate
	CSX Rail Line
	NS Rail Line
	Short Rail Line
Columbia	City Name
	City Marker
	Interstate Number

NORTH EASTERN STRATEGIC ALLIANCE

FOOD MANUFACTURING COMPANIES

BENNETTSVILLE

- Popz

CHERAW

- Pepsi Canning Company

DARLINGTON

- Birdsong

DILLION

- Perdue

EFFINGHAM

- McCall Farms

FLORENCE

- Niagara Water
- Pepsi
- Performance Food Group
- Ruiz Food Products, Inc.

HARTSVILLE

- Sonoco

HEMINGWAY

- House of Raeford

MCBEE

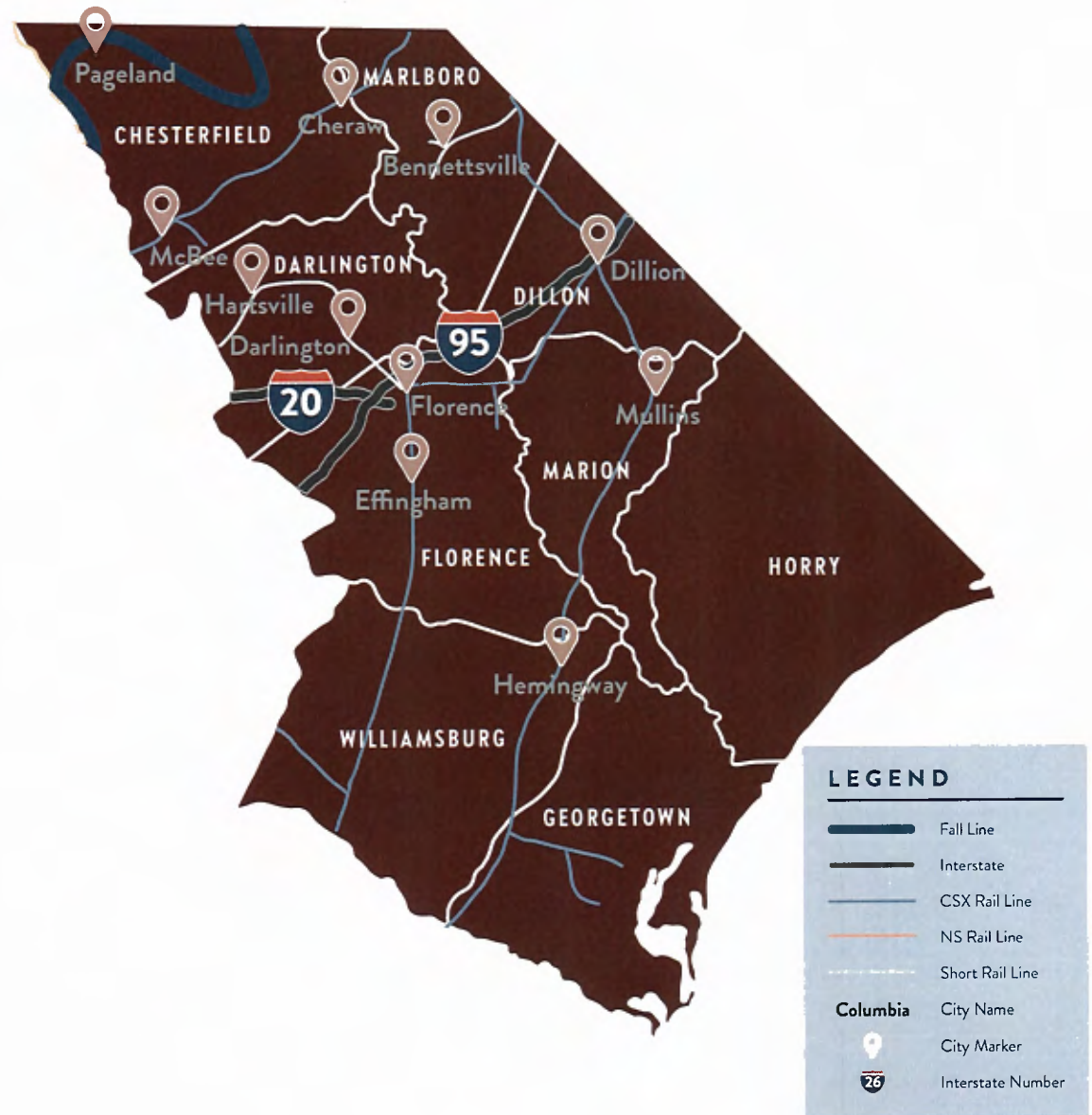
- Nestle Bottled Water

MULLINS

- SOPAKCO

PAGELAND

- Aviagen
- Walmart Grocery Distribution



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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
in The Supreme Court

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Harold W. Funderburk, Jr., Administrative Law Judge
Docket No. 17-ALJ-17-0060-CC
Appellate Case No. 2019-001933

Opinion No. 5972 (S.C. Ct. App. Filed March 1, 2023)

McEntire Produce, Inc.....Petitioner,

v.

South Carolina Department of Revenue..... Respondent.

PROOF OF SERVICE

I certify I have served Petitioner’s Reply to Respondent’s Return to Petition for a Writ of Certiorari on counsel of record for the South Carolina Department of Revenue and to the Clerk of the Court of Appeals via electronic mail on July 31st, 2023, addressed to:

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Jul 31 2023

SC Court of Appeals

Jim Rourke, J.D., LL.M (Tax)
Shareholder

July 31, 2023

The Honorable Patricia A. Howard
Clerk South Carolina Supreme Court
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Columbia, SC 29201

RE: McEntire Produce, Inc. vs. South Carolina Department of Revenue
Docket No. 17-ALJ-17-0060-CC
Appellate Case No. 2019-001933
Opinion No. 5972

Dear Ms. Howard:

Enclosed for filing is the Petitioner's Reply to Respondent's Return to Petition for a Writ of Certiorari and Proof of Service of same on counsel for South Carolina Department of Revenue and the Clerk of the Court of Appeals in the above-referenced matter.

Thank you for your assistance in this matter.

Very truly yours,

A handwritten signature in blue ink, appearing to be "JR", written over the typed name "Jim Rourke".

Jim Rourke

Enclosure

cc: The Honorable Jenny Abbott Kitchings
Elisabeth W. Shields, Esq.
Jason P. Luther, Esq.